STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS,
O'Connell, P.J., Talbor, and Stephens, J.J.

LEAH ROSE FOSTER,

Appellee,

Docket No.: 139872

vs.

DAVID KENNETH WOLKOWITZ,

Defendant/Appellant.
_____/

BRIEF ON APPEAL—APPELLEE

James S. Adray (P31259)
Adray & Grna
Attorneys for Plaintiff/Appelle
709 Madison Ave. Suite 209
Toledo, OH 43604
(419) 241-2000

Maria Zagorski (P44735)
LaVoy & Zagorski, P.C.
Attorneys for Appellee
2 East First Street, Suite 207
Monroe, Michigan 48161
(734) 457-2112

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COUNTERSTATEMENT OF BASIS OF JURISDICTION

Appellee agrees with the Appellant's Statement of Basis of Jurisdiction but preservers her argument that the Court of Appeals had jurisdiction over custody only pursuant to Appellant's appeal as of right [MCR 7.204]. Appellee *disagrees* that the appeal was filed in a timely manner on the issue of jurisdiction as the decision appealed from was issued on February 17, 2009 and the appeal was not filed until April 28, 2009.

Appellee agrees that the Court of Appeals issued its opinion on September 15, 2009 and that Appellant timely appealed that decision by filing an application with this Court on October 27, 2009.

Appellee agrees that this Court granted leave and issued an order on December 16, 2009; and that this Court has jurisdiction as it has elected to review the Court of Appeal's decision. MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

1. **DID THE COURT OF APPEALS ERR IN RELYING ON THE MICHIGAN ACKNOWLEDGEMENT OF PARENTAGE ACT (APA), MCL 722.1001 ET SEQ., RATHER THAN THE UNIFORM CHILD CUSOTDY JURISDICTION AND ENFORCEMENT ACT (UCCJEA), MCL 722.1101 ET SEQ. TO DETERMINE THAT MICHIGAN SHOULD EXERCISE SUBJECT-MATTER JURISDICTION IN THIS INTERSTATE CHILD CUSTODY DISPUTE?**

Plaintiff/Appelle:		No
Appellant:	Yes	
Court of Appeals:		No
Trial Court:		No

2. **IF THE COURT OF APPEALS CORRECTLY RELIED ON THE APA TO ESTABLISH SUBJECT-MATTER JURISDICTION IN MICHIGAN, DOES THE STATUTE VIOLATE THE EQUAL PROTECTION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS BY CREATING A SUSPECT CLASSIFICATION OF UNMARRIED FATHERS WHO ARE TREATED DIFFERENTLY THAN MARRIED FATHERS?**

Plaintiff/Appellee:		No
Appellant:	Yes	
Court of Appeals:		No
Trial Court:		No

3. **IF JURISDICTION PROPERLY LIES IN ILLIONOIS, AS THE CHILD'S "HOME STATE" UNDER THE UCCJEA, MCL 722.1102(g), MCL 722.1201(1), WHETHER MICHIGAN IS THE MORE CONVENIENT FORUM FOR RESOLUTION OF MATTER.**

Appellee:		Yes
Appellant:	No	
Court of Appeals:		Yes
Trial Court:		Yes

4. **WHETHER AND HOW THE CHILD SUPPORT MATTER AFFECTS THE JURISDICTIONAL QUESTION IN THIS CASE.**

Appellee:		Yes
Appellant:	No	
Court of Appeals:		Unknown
Trial Court:		Unknown

5. WHETHER THE MICHIGAN TRIAL COURT'S JURISDICTION OVER CHILD SUPPORT IS COEXTENSIVE WITH ITS JURISDICTION OVER CUSTODY.

Appellee:		Yes
Appellant:	No	
Court of Appeals:		Unknown
Trial Court:		Unknown

COUNTERSTATEMENT OF FACTS

The parties to this action are the parents of Mila Jane Wolkowitz, who was born on October 12, 2006 in Oakland County, Michigan. Appellee had lived in Chicago, Illinois previously and had returned to Michigan in August, 2006 (Appellant's Appendix p. 74a). The parties returned to Chicago at the end of April or beginning of May, 2007. *Id.* For the following year, Appellee spent at least 25% of her time in Michigan (*Id.*, p. 75a) and more (*Id.*, p. 32a). In fact, Appellant would repeatedly invite Appellee to take the child and leave him (*Id.*, p. 69a). He asked her at one point to stay in Michigan. *Id.*, p. 75a.

Appellant was emotionally abusive and physically threatening. He would scream at Appellee in front of the child (*Id.*, p. 51a). He threw things. *Id.*, p. 51a. He threw a plate, for example. *Id.*, p. 55a. He crushed wine glasses in his hand. *Id.*, p. 55a. He would throw his bag. *Id.*, p. 55a. He broke eyeglasses and pens. *Id.*, p. 56a. He told Appellee that the "look on [her] face makes me want to punch [her] right now," *Id.*, pp. 76a-77a; p. 83a. He told her that if she "was a dude, he'd kick [her] ass or something," *Id.*, p. 83a. Finally, Appellee reached her breaking point, so to speak. Appellee was attempting to get a job and had an interview but Appellant did not approve of the way she said goodbye to the child that morning. *Id.*, p. 64a. On the way to the interview, Appellant phoned her three or four times so she could hear the child scream "because he wanted [her] to hear the mistake that [she] had made." *Id.*, p. 65a; p. 66a. Appellee could not attend the interview because she herself was crying (*Id.*, p. 66a); she had enough. Within a day she found a videotape that Appellant had made while the child had been screaming. He had actually videotaped the child screaming and Appellee

thought that abusive. *Id.*, p. 51a. Appellee decided it was time to get out; she left because of the video. *Id.*, p. 91a.

Appellee knew she could not leave without the police. *Id.*, p. 85a. She did not know how to leave him, (*Id.*, p. 91a), but had wanted to for months. *Id.* Appellee felt this was an emergency. *Id.*, pp. 32a-33a; p. 84a. She had consulted with law enforcement both at this time and before. *Id.*, p. 36a. She wanted to get herself and the child to a "safe place." *Id.*, p. 37a. In fact, law enforcement had advised her to go to Michigan. *Id.*

Appellee came to Michigan on May 11, 2008[1] and filed her Complaint for paternity on May 16, 2008. Contemporaneously, Appellee filed a motion regarding custody and a request for child support. At the time she filed, she did not know there was an affidavit of parentage, nor was any action filed in Illinois. She learned of the affidavit on November 7, 2008 (Deposition Transcript, p. 12, line 13). She did not recall signing it. *Id.*, p. 73a. Appellant avoided service and after five attempts, Appellee obtained an order allowing the pleadings to be tacked to Appellant's door. While Appellee was attempting to obtain service, Appellant filed an action in Cook County, Illinois on June 4, 2008 and obtained service on Appellee.

On July 7, 2008, the Cook County, Illinois and Monroe County, Michigan courts conferred. Because both mother and child were in Michigan, the courts agreed that it was appropriate for Michigan to conduct an evidentiary hearing on the issue of jurisdiction; Appellant was granted parenting time. *See*, Transcript from hearing held July 7, 2008. It is significant to note that the judges agreed that jurisdiction would be better in Michigan. *Id.*, p. 106a. Further, and importantly, the Illinois court transferred

[1] Transcript from Hearing held July 7, 2008 Appellant's Appendix at pp. 112a-113a.

jurisdiction to Michigan via order entered March 23, 2009. The Court later denied Appellant's request to vacate that order, but modified the "without prejudice" provision pending determination of this matter.

Two evidentiary hearings were scheduled with the first ordered to be held as soon as practicable, but both were adjourned at the request of Appellant. *See*, Orders dated July 9, 2008 and July 23, 2008 Appellee's Appendix 19b-20b; Transcript from hearing held January 6, 2009 at p. 8a. On January 6, 2009, the parties and counsel appeared for the hearing. Some brief testimony was taken, the affidavit of parentage was introduced as an exhibit, and the Court recessed to meet with counsel. Upon returning on the record, the Court advised that counsel had requested time to research the interplay of the Acknowledgement of Parentage Act and the UCCJEA. The matter was adjourned to February 20, 2009. *Id.*, p. 15a. On February 17, 2009, the Court issued a written decision which found that Michigan has jurisdiction to hear the contested custody case. *See*, Decision and Order Regarding Jurisdiction (Appendix 183a). The matter proceeded to a custody hearing, which was held on March 23, 2009. The Court issued its findings and decision from the Bench on March 23 and 24, 2009; that decision was reduced to writing and is contained as the order dated April 8, 2009.

The trial court's decision was appealed and on September 15, 2009, the Court of Apeals affirmed the trial court, determining that the Court could exercise jurisdiction pursuant to the UCCJEA; that the APA and UCCJEA could be read together and thus no conflict exists; that the APA does not violate the equal protection clauses of the state and federal constitutions; and that Appellant was not entitled to fees and costs. See Appendix at p. 188a. This appeal was then filed.

ARGUMENTS

1. **DID THE COURT OF APPEALS ERR IN RELYING ON THE MICHIGAN ACKNOWLEDGEMENT OF PARENTAGE ACT (APA), MCL 722.1001 ET SEQ., RATHER THAN THE UNIFORM CHILD CUSOTDY JURISDICTION AND ENFORCEMENT ACT (UCCJEA), MCL 722.1101 ET SEQ. TO DETERMINE THAT MICHIGAN SHOULD EXERCISE CONTINUING JURISDICTION IN THIS CHILD CUSTODY DISPUTE?**

STANDARD OF REVIEW:

Cases of statutory interpretation are reviewed *de novo* on appeal. *Bay County Prosecutor v Nugent*, 276 Mich App 183; 740 NW2d 678 (2007). Similarly, Appellant's argument regarding the constitutionality of a statute is a question of law that the appellate Court will review *de novo*. *Rose v Stokely*, 258 Mich App 283; 673 NW2d 413 (2003).

ARGUMENT:

The Court of Appeals did not err when it relied upon the APA rather than the UCCJEA and determined that Michigan should exercise subject-matter jurisdiction in this custody matter. The Court of Appeals correctly adopted a two pronged analysis to reach the result mandated when the statutes are read together because the APA and the UCCJEA determine subject matter jurisdiction. Under its analysis the Court of Appeals found it unnecessary to determine the "home state". As will be discussed more fully in Arguments D and E, a failure to read the statutes together would make the UCCJEA a legal nullity because Michigan law would conflict with it.

In its order decision dated September 15, 2009, the Court of Appeals determined that the Acknowledgement of Parentage Act [MCL 722.1001 *et seq.*] and the UCCJEA

[MCL 722.1101, *et seq.*] when read together conferred subject matter jurisdiction on the trial court[2]. Reading the statutes together as one law and thereby avoiding any conflict in the two statutes the court adopted a three tier analysis for the trial court to assert "continuing jurisdiction". As stated in *Omne Financial, Inc. v Shacks, Inc.*, 226 Mich App 397, 402; 573 NW2d 641 (1997), "Jurisdiction deals with the power of a court to hear a class of cases or the authority of a court to bind the parties." Because MCL 722.1006 establishes "initial custody" to the mother, an initial custody determination had been made pursuant to law. This is clearly the legislative intent. The second article of the UCCJEA is entitled "Jurisdiction" and states explicitly that "a court of this state has jurisdiction to make an initial child-custody determination" only in limited circumstances. MCL 722.1202(1). There was no need for an initial custody determination in this matter, the same having been made by the voluntary actions of the parties, resulting in a determination of custody by operation of law (APA).[3]

APA Analysis

The court further reasoned that the APA had two (2) key provisions. First, MCL 722.1006 provides:

> "After a mother and father sign an acknowledgment of parentage, *the mother has initial custody of the minor child*, without prejudice to the determination of either parent's custodial rights, *until otherwise determined by the court* or otherwise agreed upon by the parties in writing and acknowledged by the court. This grant of initial custody to the mother shall not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time. [Emphasis added.]"

Second, MCL 722.1010 provides:

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[2] The court's analysis is that the trial court is exercising "continuing jurisdiction" under these conditions with certain safeguards.

[3] This initial determination of custody mandated that the trial set support and determine temporary custody and parenting time pursuant to the Family Support Act [MCL 552.451, *et seq.*]. This argument will be developed in Argument E.

> "[e]xcept as otherwise provided by law, a mother and father who sign an acknowledgment that is filed as prescribed by section 5 are *consenting to the general, personal jurisdiction of the courts of record of this state regarding the issues of the support, custody, and parenting time of the child*. [Emphasis added.]"

The Court further analyzed the UCCJEA and its requirement of "an initial determination" and how it is defined. The UCCJEA defines a "child-custody determination" as "a judgment, decree, or other court order providing for legal custody, physical custody, or parenting time with respect to a child.[4] Child-custody determination includes a permanent, temporary, initial, and modification order. Child-custody determination does not include an order relating to child support or other monetary obligation of an individual." MCL 722.1102(c)

The Court ultimately determined that the two (2) statutes in question could and should be read harmoniously. The Court stated that under the APA there has already been an initial determination of custody by operation of Michigan law. That determination is given the same status as one made by a court to allow the Michigan court to exercise continuing jurisdiction if the "significant connection test" with Michigan is met. The question then becomes whether or not there is a significant connection between the child and one parent with the State of Michigan. This analysis uses the plain meaning of the statutes.

The analysis of the Court of Appeals requires two (2) elements in order for a Michigan court to exercise subject matter jurisdiction:

(1) that there be a signing of the affidavit of parentage under the APA by both parents; *and*

[4] The act is silent if there is an administrative or legislative determination.

(2) there is then an exercise of continuing jurisdiction under the UCCJEA and

If the foregoing two (2) conditions are met, there is an exercise of continuing jurisdiction under the UCCJEA so there is no inquiry necessary as to the child's "home state." In adopting this analysis, the Court of Appeals then went on to reason that it is the *continuing* jurisdictional requirements of the UCCJEA that must be examined where there is an initial determination by law. The Court then undertook an analysis of whether or not the child had a significant connection with Michigan. Appellee submits that it is correct and the only way in which these two statutes can be construed harmoniously. The APA is controlling and has superior application over the UCCJEA. Uniform codes are subservient to particular statutes. *See*, *Messer v Averill*, 28 Mich App 62, 66-67; 183 NW2d 802 (1971), wherein it was stated,

> That where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the Legislature cannot presume to have intended a conflict," citing *Reed v Secretary of State*, 327 Mich 108; 41 NW2d 491 (1950), quoting from *Heims v School District No. 6 of Davison Township*, 253 Mich 248; 234 NW 486.

The primary goal of judicial interpretation of statutes is to give effect to the intent of the Legislature. *Yaldo v North Pointe Insurance Company,* 457 Mich 341; 578 NW2d 274 (1998), citing *Farrington v Total Petroleum, Inc.*, 442 Mich 201,212; 501 NW2d 76 (1993). "In determining legislative intent, we look first at the words of the statute. If the language is clear and unambiguous, judicial construction is not normally permitted." *Yaldo*, at p. 346. The language of MCL 722.1010 states explicitly that parties who sign an acknowledgement which is then filed as required by law "are consenting to the

general, personal jurisdiction of the courts of record of this state regarding the issues of the support, custody, and parenting time of the child." Just because two statutes overlap does not mean that the clear and unambiguous language of one statute is changed. *Id.*, at p. 348.

The analysis by the Court of Appeals gives full legal imprimatur to both the APA and the legislative intent and further continues the protections in disputes by requiring there be a significant connection to Michigan. The significant connection test deals with the equal protection and due process arguments in that even if the first and second parts of the test are met, there must still be a significant connection with the State of Michigan before the court can proceed. The exercise of continuing jurisdiction requires no analysis as to the home state but rather adopts a significant connection test.

The Court of Appeals analysis requires that the Michigan Court find "significant connections" with the State of Michigan which prevents absurd results.

Finding a significant connection, the Court stated that the trial court had continuing jurisdiction to modify the "initial determination of custody" made by the APA which is a determination made by the legislature and supported by public policy. The actions of the parties in signing the birth certificate created an initial custody determination by operation of the law. The legislature made a policy determination that the initial custody order under APA was the same and should be treated as the same as an initial custody order under the UCCJEA allowing the court to exercise continuing jurisdiction if the Court further finds, after analysis, that a "a significant connection" with Michigan exists.

It is the concluding significant connection analysis that the Court must undertake that prevents the absurdities that Appellant refers to in his brief where he discusses the possibility of having to litigate in Michigan when both parties live in Alaska. Statutes should be construed so as to prevent absurd results, injustice, or prejudice to the public interest. *McAuley v. General Motors Corp.*, 457 Mich 513, 518; 578 NW2d 282 (1998). This analysis means that before asserting continuing jurisdiction the Court must find a substantial connection with Michigan which means there must be substantial evidence in the state affecting the child's welfare, and also that paternity was determined.

Because the Michigan law, by operation, gave custody to the mother, the actions of the trial court are to be viewed as modifying an initial order and not under the UCCJEA as an exercise of original jurisdiction in an initial custody determination. In doing so the reviewing court determined correctly, that Michigan had continuing jurisdiction in this case because the child and one parent still had a significant connection with Michigan.

CONCLUSION

The primary goal of judicial interpretation of statutes is to give effect to legislative intent. Uniform codes are subservient to particular statutes. In adopting the analysis as they did the Court of Appeals gives effect to the legislature's will that courts exercise continuing jurisdiction in those instances where there is an initial determination under Michigan law and the child and one of his parents maintains a continued connection in Michigan. This conclusion is supported by the strong public policy in favor of paternity acknowledgements at birth as opposed to requiring paternity actions, the

superiority of particular statutes over uniform codes and guarantees access to the courts of unwed parents.

2. **IF THE COURT OF APPEALS CORRECTLY RELIED ON THE APA TO ESTABLISH SUBJECT-MATTER JURISDICTION IN MICHIGAN, DOES THE STATUTE VIOLATE THE EQUAL PROTECTION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS BY CREATING A SUSPECT CLASSIFICATION OF UNMARRIED FATHERS WHO ARE TREATED DIFFERENTLY THAN MARRIED FATHERS?**

STANDARD OF REVIEW:

Issues of statutory construction and questions of constitutional law are likewise reviewed de novo on appeal. *Feyz v. Mercy Memorial Hospital*, 475 Mich. 663, 672, 719 N.W.2d 1 (2006); *Wayne County v. Hathcock*, 471 Mich. 445, 455, 684 N.W.2d 765 (2004).

ARGUMENT

There is no violation of the Equal Protection Clauses of the State and Federal Constitutions when the APA is applied as written. As Appellee has argued previously, the APA is the antithesis of an equal protection violation because signing is voluntary and not mandatory [MCL 722.1007(b)] and the Act grants *each* parent the ability to seek parenting time or custody [MCL 722.1007(d)]. To argue otherwise is akin to asserting that the UCCJEA violates the equal protection clause because it treats parents from different states differently. Both Acts operate to "level the playing field" and insure that a party's rights are protected regardless of that individual's particular circumstances.

Of more significance legally, however, is the fact that characterizing the issue as one between married and unmarried fathers is a misnomer. The statutes surrounding custody, parenting time, and support exist for the benefit of children. Unfortunately, Appellant continues to characterize the argument regarding equal protection as one about *him* when the law has stated clearly that the right to equal protection applies to

the *child*. Illegitimate children as a class enjoy equal protection of law, and within this context the standard of review is not the "strictest scrutiny" but not "toothless," either. *Trimble v Gordon*, 430 U.S. 762, 767; 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977). Indeed, the United States Supreme Court has "expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships," *Id.*, at p. 769. As recognized by this Court at *In re Barlow*, 404 Mich 216; 273 NW2d 35 (1978), the law has evolved from a beginning in which illegitimate children were wards of parishes to one in which "as in the case of legitimate children, the mother is the natural guardian of her child and has a primary right to his or her custody," and "after the mother the putative father of an illegitimate child has custody rights paramount to those of any other person," at p. 227. The APA furthers the goal of treating illegitimate children the same as legitimate children and affords them equal protection by providing them "identical status, rights, and duties of a child born in lawful wedlock effective from birth." MCL 722.1004. The Act also gives parents access to the courts as married persons have and allows either to petition a court to exercise its continuing jurisdiction to determine custody, child support and parenting time.

CONCLUSION

The legislature has mandated that there be an opportunity for unwed parents to insure their children the same rights as those legitimated through parental marital status without necessarily having to use the judicial process to ensure those rights. In availing themselves of this process, which benefits both parents and children, the legislature has developed a statutory scheme that ensures due process and equal protection to all of

the parties. The purpose of the APA is to protect both children and parties who seek to be parents. Appellant overlooks these issues in attacking APA. It is that legislation itself that gives a father of a child born to unwed parents the standing necessary to assert parental rights, and thus protect those fundamental rights.

3. **IF JURISDICTION PROPERLY LIES IN ILLINOIS, AS THE CHILD'S "HOME STATE" UNDER THE UCCJEA, MCL 722.1102(g), MCL 722.1201(1), WHETHER MICHIGAN IS THE MORE CONVENIENT FORUM FOR RESOLUTION OF MATTER.**

STANDARD OF REVIEW:

Whether a trial court has subject-matter jurisdiction presents a question of law that this Court reviews de novo." *Atchison v. Atchison*, 256 Mich.App. 531, 534, 664 N.W.2d 249 (2003). However, " the determination whether to exercise jurisdiction under the UCCJEA [is] within the discretion of the trial court, and would not be reversed absent an abuse of that discretion." *Young v. Punturo* (On Reconsideration), 270 Mich.App. 553, 560, 718 N.W.2d 366 (2006).

ARGUMENT

The trial court and the Court of Appeals have found that Michigan has subject matter jurisdiction albeit for reasons that will were incorrect. Appellant relies solely upon a singular interpretation of the UCCJEA for his argument that Michigan lacks subject matter jurisdiction. Totally ignored in this entire process are the actions of the Illinois court which are crucial to the determination of this case.

As set forth in the Counterstatement of Facts, there is and has been a significant connection between this state and the child. As this Court is aware, this is one basis upon which to find jurisdiction. *See*, *White v Harrison-White*, 280 Mich App 383 (2008), which operates to expand this state's ability to take/keep jurisdiction. The testimony has established that the child has had a significant connection with Michigan throughout her life. To begin, she was born in Michigan. She had a pediatrician in Michigan. She spent greater than 25% of her time in Michigan. Appellee and the child would take

respites in Michigan every month for a week or more, and spent entire months in Michigan. As analyzed in *White*, *supra*, courts of other states have found a significant connection between a child and a state when the child spends 20% of her time in that state; when the child travelled to visit for "several weeks at a time;" when the child spent "Spring Break and the month of July" in that state, etc. *White* reflects the fact that courts are expanding the ability to take and keep jurisdiction, as is proper in the instant case.

The child's medical records, extended family and day care records were in Michigan at the time the action was filed and continues to be here in Michigan. The abundance of evidence concerning her relationships, care, home environment and her extended family, along with her medical and dental records are here in Michigan. The child has resided here for a majority of her young life. One of her parents resides here and most of the litigation that has occurred has occurred here. Certainly if we focus on the child, most of the relevant factors concerning her life are here in Michigan. Because of accessibility and proximity to the court and her home, Michigan is a more convenient forum.

The Illinois court and the trial court in Michigan did confer as required under the UCCJEA in those instances in which there are two actions pending in different states. The transcript discloses that the judges, in their discussions agreed that a jurisdictional hearing should be held in Michigan. The following is the colloquy that occurred:

> THE COURT: Well, it looks like we're gonna have to have a full blown evidentiary hearing, and I can't very well do it without your client being there.
> JUDGE MILLS: And vice-versa.
> THE COURT: Yeah, I agree, Judge.

JUDGE MILLS: Since this child is there, why don't you have the jurisdictional hearing there.

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and the following:

MS. DEFREITAS: I believe that's the case, Judge.
JUDGE MILLS: I think he already is on the birth certificate.
MS. DEFREITAS: He's on the birth certificate and also signed an affidavit of parentage, voluntary acknowledgement, that's correct, Judge.
THE COURT: Here in Michigan?
MS DEFREITAS: Yes, that's correct, in Michigan.
THE COURT: Gosh, I would – would almost tend to think, you know, that coupled with the fact that she's here, the child is here, wouldn't jurisdiction be better herein in Michigan?
JUDGE MILLS: Judge, I agree with you – (Emphasis added)"
[Emphasis added; Appellant's Appendix at pp. 118a and 106a.]

Both courts reasoned correctly that Michigan was the more appropriate forum for adjudication of the issues. In fact, after the trial court made its findings and asserted jurisdiction in the matter, the Illinois court filed an order transferring jurisdiction to Michigan. (See Appendix p. 1b). As this Court is well aware, a court speaks through its written judgments and orders. *Tiedman v. Tiedman*, 400 Mich. 571,576; 255 N.W.2d 632 (1977); *Stackhouse v. Stackhouse*, 193 Mich.App, 437, 439; 484 N.W.2d 723 (1992). For whatever reason the Illinois court yielded to the Michigan court and initially dismissed the action of the appellant with prejudice. Later, upon a timely Motion to vacate, the court denied Appellant's request to do so but took the case off the "call' docket pending the appeal to the Michigan Court of Appeals. (See Appendix page 7b).

The Illinois trial court's actions can be reasonably interpreted as a refusal to exercise jurisdiction based upon Illinois being an inconvenient forum. The Appellant stands on a formality that the Illinois court needed to make certain findings but ignores the fact that there is a valid order in Illinois transferring the matter to Michigan. It should

be noted that during this conference between the jurists, both parties were represented by counsel at both courts, all of whom participated in the hearing.[5]

The sum and substance of this case is that if this Court reverses the decision of the Court of Appeals then the entire case will have to be re-litigated. An action will be filed in Illinois and in Michigan. Then, with the lapse of time, due principally by continuances requested by Mr. Wolkowitz, and his appeals, the Courts will go through the same process again. There is no reason to believe that if this case is reversed that the outcome of the jurisdictional issue will be any different, especially since at the time of the jurisdictional hearing Michigan was, and continues to be, the "home state" for UCCJEA purposes; Illinois cannot be determined to be the home state.

Further supporting this reasoning is the fact that at all points after June 2008 the Appellant had an action pending in Illinois which he virtually abandoned. (Cf: *Nash v. Salter*, 280 Mich App 104; 760 N.W.2d 612 (2008), where the Texas applicants did not abandon the initial action there and it went to judgment).

The Illinois court approved the Michigan court's assertion of jurisdiction and adopted it in an order. If in fact this order of the Illinois Court is incorrect then the remedy lies in Illinois. Appellant would have this Court reverse the Court of Appeals and the trial court, leave the child and the custody matter in limbo, and re-litigate the case again with no assurance, or probability under his proposed analysis, of a different outcome. While the Appellant properly appealed the Michigan decision, there is no appeal of the Illinois decision. There is no assurance that Illinois will assert jurisdiction and further, Michigan is now the "home state" under the UCCJEA. In fact, a close

[5] It deserves noting that the courts were both made aware that Mr. Wolkowitz had signed the paternity affidavit at this time.

reading of the Illinois Judgment Entry states that the parties consented to transfer of jurisdiction to Michigan.[6]

The UCCJEA became effective in Michigan on April 1, 2002. Section 201, codified in Michigan as MCL 722.1201, and sets forth the basic jurisdictional requirement for making an initial custody determination:

> "(1) Except as otherwise provided in section 204,[1] a court of this state has jurisdiction to make an initial child-custody determination only in the following situations:
>
> (a) This state is the home state[2] of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.
>
> (b) A court of another state does not have jurisdiction under subdivision (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under section 207 or 208, and the court finds both of the following:
>
> (i) The child and the child's parents, or the child and at least 1 parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
>
> (ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.
>
> (c) All courts having jurisdiction under subdivision (a) or (b) have declined to exercise jurisdiction on the grounds that a court of this state is the more appropriate forum to determine the custody of the child under section 207 or 208.
>
> (d) No court of another state would have jurisdiction under subdivision (a), (b), or (c).
>
> (2) Subsection (1) is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.
>
> (3) Physical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child-custody determination.

Implicitly in its decision the Illinois court found that under (a) it declined to exercise jurisdiction and that the parent and one child lived in Michigan and have a significant connection with Michigan and that there is substantial evidence in Michigan

[6] If this is correct then Michigan's assertion of jurisdiction is supported by APA and the UCCJEA.

concerning the child's care, protection, training, and personal relationships as required by the UCCJEA. It transferred the case to Michigan. In doing so it yielded its jurisdiction to that of the trial court. Further that Order itself says that this is done by *consent* of the parties. (Appendix page 1b)

This is a reasonable interpretation of the actions of the Illinois court. Even assuming that on a remand Illinois would find that it is the "home state" of the child, then the UCCJEA at both MCL 722.1102(g) and MCL 722.1201(l) lead to the conclusion that at the present time Michigan is the more convenient forum for resolution of this matter for the same reasons. See MCL 722.1202(2); MCL 722.1207. Appellant, who was represented in Illinois by imminently qualified counsel, did nothing with the Illinois court's action or inaction and in fact, as the record shows, sought and was given two (2) continuances by the Michigan trial court.

Any delay in the Michigan proceedings must be construed against the appellant. He now wants this Court to rectify what he finds as fault in Illinois. He could have sought a stay of the Illinois proceedings.

To the extent that appellant finds fault with the Illinois Court's actions in either not prosecuting, transferring or dismissing his action, his remedy is not with this Court or the Court of Appeals; rather, appellant should have sought a stay of the Michigan proceedings, pending a review of the Illinois Court's deferral to Michigan, by a higher Court in Illinois. *See* MCL 722.1206(3).

Since under either APA or the UCCJEA Michigan could assert jurisdiction then the issue becomes whether or not the trial court abused its discretion. An abuse of discretion occurs if the trial court's decision falls outside a principled range of outcomes.

Jamil v Jahan, 280 Mich.App. 92, 100; 760 N.W.2d 266 (2008). At the time of commencement of the Illinois proceedings a child-custody proceeding had been commenced in Michigan having jurisdiction substantially in conformity with the UCCJEA.[7] The proper procedure to follow is set forth at MCL 722.1206 and the proper remedy was for Appellant to request a stay of the Michigan proceedings and litigate the issue in Illinois. Having failed to do so how can he now complain?[8]

This court is not constrained to the decisions of the lower courts in upholding the correct outcome and there is an avenue whereby this Court can sustain the lower courts' determination on other grounds that is within the acceptable parameters of the UCCJEA. In affirming the trial court's judgment or the judgment of the Court of Appeals this court is not limited by the either court's rationale or the party's arguments in Illinois or Michigan. The law of both Michigan and Illinois support this proposition. *Greeling v. Abendroth*, 351 Ill App3d 658. The Court may affirm the trial court on any basis supported by the record. *Northern v. Illinois Commerce Comm'm*, 392 Ill App3d 542. *In re Temple Marital Trust, supra*, 278 Mich.App. 122, 128; 748 N.W.2d 265 (2008). *Jamil, supra.*

The comments to the UCCJEA state: "[T]his Act should be interpreted according to its purposes which are to: [] (2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child." 9 U.L.A. § 101, Comment, at 657 (1999); *See,* also, *In re*

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[7] Apppellant filed her action May 16, 2008. See Appellant's Appendix page 1a. Appellee filed his action June 4, 2008. See Appellee's Appendix page 8b. With two actions pending it became mandatory that the courts communicate with each other, as they did.

[8] Interestingly, Appellant filed a motion with the Monroe County trial court regarding parenting time on December 7, 2009, in which he asked that parenting time be established, changed, and made-up. The trial court granted him a full hearing, which concluded on January 26, 2010 and his parenting time was reinstated.. In other words, he successfully availed himself of the very court he claims has no jurisdiction. See, Appellee's Appendix page 15b, et seq.

D.S., 217 Ill.2d 306, 317-18, 298 Ill. Dec. 781, 840 N.E.2d 1216 (2005). To that end, the UCCJEA is replete with provisions which either encourage or require courts to communicate with each other. *See* 750 ILCS 36/110, 204, 206, 307; S*ee* also 750 ILCS 36/112 which set forth provisions for "Cooperation Between Courts". This is exactly what the courts did. In doing so a determination was reached in Michigan and adopted by the Illinois court. This determination is within the range of principled outcomes as mandated by both Michigan and Illinois law. The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *In re Temple Marital Trust, supra.* In the matter, the appellate court sustained the trial court on grounds other than those used by the trial court in reaching its conclusion. This Court has the ability to sustain the Court of Appeals and the trial court which both reached a reasoned and principled outcome of this case by giving the acts of the Illinois court and the Michigan court their true intention and meaning while looking at the UCCJEA. In doing so, this Court avoids the necessity of addressing the Appellant's arguments concerning the constitutionality of the APA and the due process arguments contained therein. These issues are rendered moot.

The APA gave the mother initial custody, and as such, her removal of the child from Illinois cannot be construed against her as being wrongful, since at the time of the removal there was no action threatened or pending in Illinois.[9] She had an absolute right to legal possession and custody of the child by virtue of the APA and the right to avail herself of judicial process.

[9] It was not until after appellee filed her action in Michigan seeking paternity, child support, and other relief that Wolkowitz filed his action in Illinois. (See Appellee's Appendix page 8b.)

The trial court heard testimony and the record is replete with evidence that she was fearful of her safety and the safety of the child. As a result and with the advice of law enforcement she left Illinois and returned to Michigan where she had lived and where her support system was located. Under Appellant's argument, the APA would grant him all the rights of parentage with no responsibilities and such a result was never contemplated by the legislature.[10] Such an interpretation also denies the mother in this case access to the Michigan courts in a situation where she is fleeing an abusive or threatening father, spouse or significant other who is the parent of a minor child. In an effort to avoid that constitutional obstacle the lower decisions can reasonably be viewed as asserting jurisdiction in another manner consistent with the UCCJEA.

In order to allow a parent access to the courts in situations where there are exigent circumstances, the legislature adopted, as part of the UCCJEA, a provision that allows the trial court to exercise temporary emergency jurisdiction. It can be found at MCL 722.1204(1), which states:

> (1) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.
>
> (2) If there is no previous child-custody determination that is entitled to be enforced under this act and if a child-custody proceeding has not been commenced in a court of a state having jurisdiction under sections 201 to 203, a child-custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under sections 201 to 203. If a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under sections 201 to 203, a child-custody determination made under this section becomes a final child-custody determination, if that is what

[10] Seeing this potential outcome, the Legislature adopted the Family Support Act, discussed more fully later in this brief.

the determination provides and this state becomes the home state of the child.

(3) If there is a previous child-custody determination that is entitled to be enforced under this act or if a child-custody proceeding has been commenced in a court of a state having jurisdiction under sections 201 to 203, an order issued by a court of this state under this section must specify in the order a period of time that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under sections 201 to 203. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

(4) If a court of this state that has been asked to make a child-custody determination under this section is informed that a child-custody proceeding has been commenced in, or that a child-custody determination has been made by, a court of a state having jurisdiction under sections 201 to 203, the court of this state shall immediately communicate with the other court. If a court of this state that is exercising jurisdiction under sections 201 to 203 is informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of another state under a statute similar to this section, the court of this state shall immediately communicate with the court of the other state. The purpose of a communication under this subsection is to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

History. 2001, Act 195, Eff. Apr. 1, 2002."

Communication between courts is required because proceedings had been filed in two different states [MCL 722.1206(2)], and pursuant to MCL 722.1110(1), "[a] court of this state may communicate with a court in another state concerning a proceeding arising under this act." Further, MCL 722.1112 states, in relevant part as follows:

"(1)A court of this state may request the appropriate court of another state to do any of the following:

(a) Hold an evidentiary hearing

(b) Order a person to produce or give evidence under procedures of that state.

(c) Order that an evaluation be made with respect to the custody of a child involved in a pending proceeding.

(d) Forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and an evaluation prepared in compliance with the request.

(2) Upon request of a court of another state, a court of this state may hold a hearing or enter an order described in subsection (1)."

This appears to be a reasonable interpretation of what happened in this case and is a principled outcome. This Court can choose to view the initial determination by the Circuit Court and the decision of the Court of Appeals in such a way to avoid the conflict suggested by the Appellant and the constitutional issues raised. By operation of law Michigan has become the home state of the child because there has been no determination in Illinois and the child has been present here for almost two years. The Illinois Court dismissed the action. While it could reinstate the action there is solid indication that the matter will come back to Michigan.

In reaching this decision, which is supported by the record and testimony, as well as the briefs filed in the lower courts, the Court emphasizes the need for judicial economy, stability in the child's life and further, the unnecessary need to re-litigate all of the issues in both Illinois and Michigan. This is especially important when the Illinois court has already given a strong indication through its order that Michigan is the proper forum for determination of the custody issue and by lapse of time and Appellant's inaction in challenging the Illinois court order, Michigan has become the home state of the child.

CONCLUSION

The trial court and the Court of Appeals found that subject matter jurisdiction was properly vested in the Monroe County Circuit Court. Using either an APA analysis or exigent circumstances under the UCCJEA the same conclusion is reached. A reasonable interpretation of the actions of both the Illinois Court and the Michigan Court is that the (2) "a court of the home state of the child has declined to exercise jurisdiction . . . ." MCL 722.1201(1)(b) and further that Michigan is the more convenient forum for adjudication of the issues. In doing so this court avoids allowing further litigation, costs and expenses and allows judicial economy while giving full weight and intent to the enactment of the UCCJEA in interstate conflicts. The case may be otherwise where Illinois was silent of gave any indication that it would adjudicate the matter. In fact, if this court reverses the judgment below, for any reason, it would leave a mother fleeing an abusive father without a forum unless she returned to the original jurisdiction.

Many factors enter into a determination of a convenient forum such as the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; and all other practical problems that make trial of a case easy, expeditious and inexpensive. These factors all favor Michigan.

4. WHETHER AND HOW THE CHILD SUPPORT MATTER AFFECTS THE JURISDICTIONAL QUESTION IN THIS CASE.

STANDARD OF REVIEW:

Issues of statutory construction are reviewed de novo on appeal. *Feyz v. Mercy Mem. Hosp.,* 475 Mich. 663, 672, 719 N.W.2d 1 (2006); *Wayne Co. v. Hathcock,* 471 Mich. 445, 455, 684 N.W.2d 765 (2004).

ARGUMENT

The Family Support Act (hereafter "FSA") [MCL 552.451, *et seq.*] dictates that a court setting child support also determine custody and parenting time, at least on a temporary basis. The Family Support Act provides a parent a forum in which to request support for his or her family under those circumstances in which a "parent with a minor child living with him or her who is living separate and away from his or her spouse who is the non-custodial parent of the child or children is refused financial assistance." MCL 552.451. MCL 552.451a extends this protection to a non-married custodial parent (thereby again guaranteeing equal protection to a legitimated child whose parents are not married). Further reading the FSA at MCL 552.452(4), it states as follows:

> "If there is no dispute regarding a child's custody, the court shall include in an order for support issued under this act specific provisions governing custody of and parenting time for the child in accordance with the child custody act of 1970, 1970 PA 91, MCL 722.21 to 722.31. ***If there is a dispute regarding custody of and parenting time for the child, the court shall include in an order for support issued under this act specific temporary provisions governing custody of and parenting time for the child.*** Pending a hearing on or other resolution of the dispute, the court may refer the matter to the office of the friend of the court for a written report and recommendation as provided in section 5 of the friend of the court act, 1982 PA 294, MCL 552.505. In a dispute regarding custody of and parenting time for a child, the prosecuting

> attorney is not required to represent either party regarding the dispute. [Amended effective January 8, 2010 without change from predecessor MCL 552.452(3), which was effective December 1, 2002]." [Emphasis added].

Significantly, the FSA has no jurisdictional prerequisite to the assertion of the circuit court's jurisdiction other than the party and child's presence in Michigan and those factors contained within the plain language of the statute, which are as follows: (1) that the parent be living with the minor child; (2) separate and apart from the non-custodial parent; (3) and that no financial assistance is being received.

In the case *sub judice*, it is absolutely unrefuted that the mother and child were present in Michigan and that she was the custodial parent via the APA. Her access to the judicial relief is guaranteed under the law by virtue of the FSA. Therefore, this guarantees her and the child due process and requires notice to the non-custodial parent. In other words, the FSA **mandates** that the court issue an order regarding parenting time and custody at least on a temporary basis when the custodial parent seeks support without regard to the child's home state.

Contrary to what the Appellant would have us believe, child support, custody, and parenting time are woven together by the statutory mandates created by the Michigan legislature.

Child support affects jurisdiction. In this matter, Appellee filed her action in Monroe County Circuit Court seeking a determination of paternity; a motion filed contemporaneously with her Complaint sought a determination of custody, parenting time, and child support. The purpose of child support has been stated repeatedly to be to provide for the needs of the child. It has nothing to do with penalizing the payor or benefiting the payee. *See, Macomb County Department of Social Services v*

Westerman, 250 Mich App 372; 645 NW2d 710 (2002); *Evink v Evink*, 214 Mich App 172; 542 NW2d 328 (1995); *Pellar v Pellar*, 178 Mich App 29, 35; 443 NW2d 427 (1989). The expressed purpose of child support is to help pay the necessary expenses attendant to rearing a child. MCL 722.23(c) and the statutory scheme set forth at the FSA allows the court to get to the best interests of the child, which is of paramount concern.

CONCLUSION

The statutory scheme enacted and used by the legislature requires that if there is an APA acknowledgement and either party seeks child support, the FSA will then require a Michigan court to make orders concerning support, custody and parenting time, even if those orders are only temporary in nature. In doing so, the legislature has created a scheme that is focused on children and ensures due process and equal protection to the parents and children born of unwed parents, to wit: the statute recognizes that various courts act with various levels of efficacy and has made provision for the courts to make temporary orders to protect all concerned until another court has time to act. In the instant matter, Illinois yielded to Michigan, Michigan issued an order, and because the Illinois court (by consent) transferred and dismissed its action, it therefore left subject matter jurisdiction intact in Michigan.[11]

[11] If this Court is inclined to view the trial court's order as temporary, it becomes, by definition, an interlocutory order and is not ripe for appeal.

5. WHETHER THE MICHIGAN TRIAL COURT'S JURISDICTION OVER CHILD SUPPORT IS COEXTENSIVE WITH ITS JURISDICTION OVER CUSTODY.

STANDARD OF REVIEW:

Issues of statutory construction are reviewed de novo on appeal. *Feyz v. Mercy Mem. Hosp.*, 475 Mich. 663, 672, 719 N.W.2d 1 (2006); *Wayne Co. v. Hathcock*, 471 Mich. 445, 455, 684 N.W.2d 765 (2004).

ARGUMENT

Michigan's jurisdiction over child support *has the same limits, boundaries, and scope as custody.* In fact, the issues of support and custody are inextricably entwined throughout the law: The Support and Parenting Time Enforcement Act [MCL 552.601, *et seq*;] states in relevant part as its purpose that the Act exists to "provide for the provisions and enforcement of *support*, health care, and parenting time orders with respect to divorce, separate maintenance, paternity, *child custody* and support," and to set forth powers and duties, and penalties and remedies for violations of parents' responsibilities (*See*, Preamble; emphasis added). The Child Custody Act [MCL 722.21 *et seq.*] defines "best interests" of a child in part by "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." MCL 722.23(c). Among the many duties imposed upon the offices of the Friends of the Court, The Friend of the Court Act [MCL 552.501, *et seq*] states its purpose to "protect the best interests of children," "compel enforcement of parenting time and custody orders; and to compel the enforcement of support orders." MCL 552.501(2). The FSA permits a "custodial parent" to proceed in

an action for child support. *See*, MCL 451.451a. In short, neither custody nor support exists in a vacuum. "Therefore, [the Court of Appeals has found] that the Paternity Act, the Acknowledgement of Parentage Act, and the Child Custody Act, which serve interrelated purposes, must be interpreted consistently with each other and read in *pari material.*" *Aichele v Hodge*, 259 Mich App 146; 673 NW2d 452 (2003); *app den* at 469 Mich 994; 674 NW2d 158 (2004).

CONCLUSION

The two issues are intertwined throughout the law. It is mandated that when a Michigan Court makes an Order under the FSA that it also make appropriate Orders concerning custody and parenting time.

CONCLUSION AND REQUESTED RELIEF

The FSA has been amended twice since the adoption of the UCCJEA in April, 2002. Neither time has the Legislature sought to change any of the provisions with respect to the APA or the FSA. Clearly, the legislative intent is that the UCCJEA is subservient to, and consistent with, the APA and the FSA. The issues under review have nothing to do with equal protection of Appellant's rights under the state or federal constitutions. They have to do with protecting children who are born to unmarried parents and with extending their right to be treated similarly under the law to the same as those children born within marriage. There is no reasonable basis upon which to conclude that Appellee and the parties' child belong in Illinois so that Appellant's rights are ensured. Illinois has expressed its disinterest in this matter, and for good reason: there is no nexus with that state.

This Court has a variety of paths to take, but they all lead to the same destination: that jurisdiction properly lies with Michigan, and that Appellant has been granted access to a judicial forum and equal protection from this case's inception. Whether one conducts an analysis under the UCCJEA, the APA, the FSA, the CCA, or any combination thereof, those laws were never designed to deny Appellee access to the courts, nor any other litigant faced with these circumstances. The Legislature carefully constructed a framework upon which the courts in this state can dispense justice. Appellee respectfully requests that this Court affirm the lower courts' findings of jurisidiction.

Respectfully Submitted,

Maria Zagorski (P44735)
LaVoy & Zagorski, P.C.
2 East First Street, Suite 207
Monroe, Michigan 48161
Phone: (734) 457-2112

James S. Adray (P31259) w/ permission MZ
Adray & Grna
709 Madison Avenue, Suite 209
P. O. Box 1686
Toledo, Ohio 43603-1686
Phone: (419) 241-2000

Attorneys for Plaintiff/Appellee